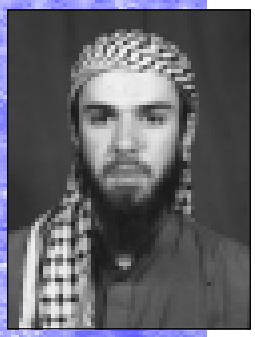
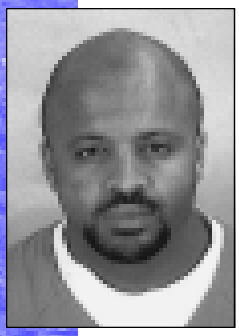
Secret Justice:

Access to Terrorism Proceedings



The War on Terrorism immediately prompted sweeping arrests and detentions — all conducted in almost unprecedented secrecy.

Reporting on detainees like



John Walker Lindh and **Zacarias Moussaoui** has often been difficult, and the other detainees might be tried before military tribunals like those that convicted Nazi saboteur **John Dasch** and seven others in 1942. Will journalists get the access they need?

Winter 2002

The Reporters Committee
For Freedom of the Press

Secret Justice:
A continuing series

The American judicial system has, historically, been open to the public, and the U.S. Supreme Court has continually affirmed the presumption of openness. However, as technology expands and as the perceived threat of violence grows, individual courts attempt to keep control over proceedings by limiting the flow of information. Courts are reluctant to allow media access to certain cases or to certain proceedings, like jury selection. Courts routinely impose gag orders to limit public discussion about pending cases, presuming that there is no better way to ensure a fair trial. Many judges fear that having cameras in courtrooms will somehow interfere with the decorum and solemnity of judicial proceedings. Such steps, purportedly taken to ensure fairness, may actually harm the integrity of a trial because court secrecy and limits on information are contrary to the fundamental constitutional guarantee of a public trial.

The public should be the beneficiary of the judicial system. Criminal proceedings are instituted in the name of "the people" for the benefit of the public. Civil proceedings are available for members of the public to obtain justice, either individually or on behalf of a "class" of persons similarly situated. The public, therefore, should be informed — *well* informed — about trials of public interest. The media, as the public's representative, needs to be aware of threats to openness in court proceedings, and must be prepared to fight to insure continued access to trials.

In this series, the Reporters Committee takes a look at key aspects of court secrecy and how they affect the newsgathering process. We will examine trends toward court secrecy, and what can be done to challenge it.

The first article in this "Secret Justice" series, published in Fall 2000, concerned the growing trend of anonymous juries. The second installment, published in Spring 2001, covered gag orders on participants in trials. The third installment, published in Fall 2001, covered access to alternative dispute resolution procedures.

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Gaining access to terrorism proceedings

The response to the September 11 terrorist attacks in New York and Washington, D.C., has highlighted a long-standing conflict in the public access area, pitting those who believe that government should be able to act without public scrutiny during times of trouble against those who believe that public scrutiny of the legal process is more important than ever.

It was immediately clear that the four passenger jets that destroyed the World Trade Center, severely damaged the Pentagon and crashed in a Pennsylvania field had been hijacked as part of a coordinated effort by terrorists to destroy American sites. All of the hijackers — there were 19 men on four planes — appear to have been Arab Muslims. Osama bin Laden, head of the al Qaeda terrorist organization, is believed to have orchestrated the attacks. And so in the weeks following the attacks, federal agents detained more than 1000 people for violating immigration laws or for being a possible "material witness" to the investigation of the attacks.

Despite numerous requests from the press and from civil rights groups, U.S. Attorney General John Ashcroft refused to reveal who was being detained, the reason for the detainment, or even the total number of detainees. The press has had difficulty reporting on the investigation because of the lack of information made available to the public.

To complicate matters, prosecutors are beginning to try alleged terrorists or others detained in the wake of the September 11th attacks. It is not yet clear how open the trials will be.

This report is designed to familiarize journalists and media law attorneys with laws and issues regarding access to proceedings in light of the "War on Terrorism." It will attempt to answer basic questions about the detainment process, access to detainees, and access to the various types of proceedings.

As discussed below, in most cases there should be a presumption of openness. However, because of the "War on Terrorism" and the perception of immediate danger to the public, many of the proceedings have been closed and the records have been sealed. Unfortunately, the First Amendment does not contain a self-executing enforcement mechanism. Because there is no automatic check on the government agencies or the courts, they will be able to close proceedings and seal records if no one challenges their actions.

What legal justification do the INS and FBI have to detain people?

In the "War on Terrorism," there are four primary reasons why a person may be detained:

1. Immigration violations. A person may be detained if he or she is in the United States illegally. The immigration laws are codified in Title 8 of the U.S. Code (8 USC); agency regulations are contained in Title 8 of the Code of Federal Regulations (8 CFR). Immigration violations may be civil or criminal. A civil immigration proceeding may lead to deportation. A criminal proceeding may lead to incarceration.

2. The "material witness" statute. The "material witness" statute, 18 USC § 3144, is a general criminal statute. It can be used in any criminal case. It is not limited to use in terrorism cases or cases involving immigrants. It is designed to ensure that people who have information about a case are available to testify and will not flee.

With respect to the "War on Terrorism," the material witness statute is being used in connection with grand jury proceedings in New York and Alexandria, Va. These grand juries were impaneled to investigate the attacks on the World Trade Center and the Pentagon, respectively.

Until the attacks, the material witness statute was used rarely — usually in cases involving organized crime — where prosecutors feared that a potential witness would flee or be killed if they were not taken into custody.

3. General criminal laws. A person may be detained or arrested for violating any federal or state law, under the ordinary rules of criminal procedure. These would be ordinary criminal proceedings, and all normal rules of criminal procedure would apply.

4. Capture on the battlefield. Any person who has fought against the United States in Afghanistan may be captured and possibly tried for war crimes or, perhaps, conspiracy. John Walker Lindh, the American Taliban fighter, is an example of this type of detainee.

There is currently a debate over whether the non-Americans captured during battle should be labeled "prisoners of war" or "unlawful combatants." The distinction is important because it will determine what kinds of rights they have, and, therefore, what kinds of rights the press will have to access the relevant proceedings and records.

What types of proceedings may be used?

It appears that there are four kinds of relevant proceedings:

1. Immigration proceedings: These are administrative trials conducted by the Immigration and Naturalization Service, a division of the U.S. Department of Justice. They will be used to try to deport or jail those persons who are in the United States illegally.

2. Material witness hearings: Federal courts may hold hearings to determine whether a material witness warrant is valid. In theory, such proceedings are ordinary court proceedings and should be open to the public, but some judges have closed the courtroom due to "security" concerns.

3. Criminal prosecution in federal court: Some detainees have been charged with crimes

and will be tried in federal court. These proceedings should be conducted like any other federal criminal trial.

4. Prosecution in military tribunal: President Bush issued a Military Order permitting the use of military tribunals. There was substantial opposition to this proposal, and, as of the date of this report, the administration is still trying to create standards that would govern such tribunals. It is not clear whether the public or press would have any access to these proceedings or whether the public would even be notified of such proceedings.

Each of these types of proceedings are discussed in detail in the articles below.

Immigration Proceedings

How do the immigration laws work?

An individual may be detained for an immigration violation, which could include overstaying a visa, entering the United States illegally, or failing to comply with green card requirements. There are certain INS officials and Border Patrol officers who are authorized to detain individuals. Once the person is detained, criminal or civil charges may be filed. The main difference between civil and criminal immigration cases is that civil cases are intended to lead to deportation and criminal cases are designed to lead to incarceration.

Specific procedures are outlined below:

1. Civil cases: Before Sept. 11, the INS was required to file civil charges against a detainee within 24 hours or release the detainee. After the Sept. 11 attacks, the INS passed an emergency regulation. Now, a detainee must be charged or released within 48 hours or "a reasonable time" if a national emergency has been declared. See 8 CFR 287. A detainee would, theoretically, be permitted to file a *habeas corpus* petition if he felt the time he had been held was unreasonable.

Once charges are filed, the detainee appears before an INS administrative judge to request a bond, if desired, and to determine whether the detainee has violated an immigration law. INS regulations provide that the INS must wait at least 10 days before bringing a detainee in front of a judge. This rule was created to protect detainees' rights, primarily to ensure that they had enough time to find an attorney before a hearing. Detainees have no right to a government-funded attorney. They may have a lawyer only if they can afford one or find a volunteer. A detainee may request a hearing prior to 10 days, but it must be affirmatively requested.

A bond may be denied if the judge finds that there is reason to believe he might escape or pose a danger to the public. A denial may be appealed to the Board of Immigration Appeals.

The judge must determine whether the detainee is "removable," which is merely a preliminary finding. If there is no evidence that the detainee is removable, he must be released. If the detainee is removable, then the judge must consider any defenses the detainee might have. Defenses include requests for political asylum or other justifications for remaining in the United States.

If there are no defenses, the judge may order that the detainee be deported. If there are defenses, the judge may order that the detainee is entitled to remain in the United States.

Both the INS and the detainee have the right to challenge the administrative judge's finding. Appeals go to the Board of Immigration Appeals. Aggrieved parties may then appeal to a U.S. Circuit Court of Appeals, or a detainee may file a petition for a writ of habeas corpus.

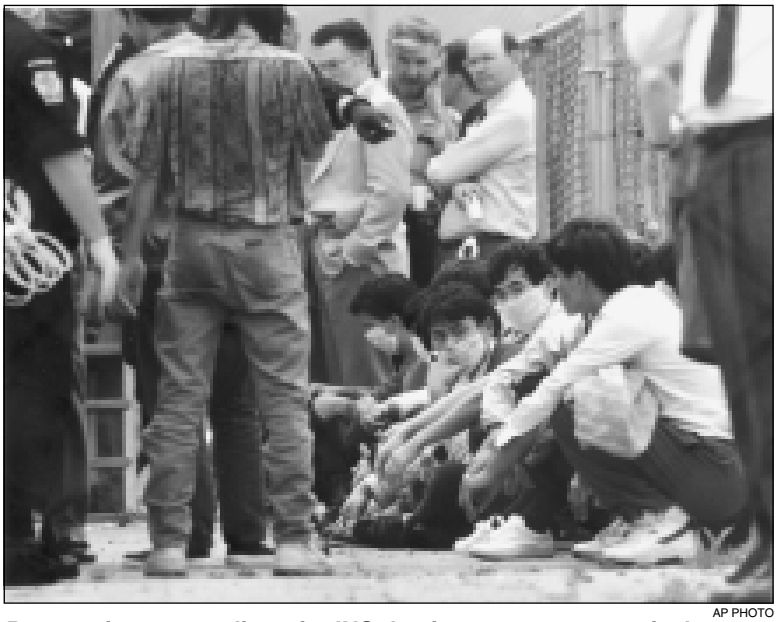
If a detainee loses all appeals, he will be deported. He has the right to choose his destination country. If they refuse him, he is sent to his country of origin. If they refuse him, he might be held indefinitely. However, last year, the U.S. Supreme Court held that aliens have some due process rights. In a case where aliens challenged their indefinite detentions, the Court ruled that the indefinite detention of aliens raised "serious constitutional concerns." The Court found that detention should generally be limited to a reasonable time, usually six months. (*Zadvydas v. Davis*)

However, the Department of Justice has contended during its September 11th investigation process that there is an implicit exception for aliens who are "terrorists." Therefore, Ashcroft issued new regulations that allow the INS to indefinitely detain an alien if the Attorney General decides that the alien poses a significant risk of committing terrorism.

If someone is held for alleged immigration violations, they may be held indefinitely because, as a practical matter, it is unlikely that a bond will be granted (due to the concern that the detainee would escape or cause harm) and the immigration procedures can take years to hold hearings and finish the appeals process.

2. Criminal cases: INS criminal proceedings are similar to ordinary criminal proceedings, and ordinary rules of criminal procedure apply. A detainee is entitled to a bond hearing to determine whether he should be released. A bond may be denied if the judge finds that there is reason to believe he might escape or pose a danger to the public. A denial may be appealed to the Board of Immigration Appeals.

The criminal cases proceed like any other criminal case. Evidence must be presented to show that the accused committed the crime alleged. If the accused is convicted, he will be sentenced and incarcerated. A convicted person may appeal, following ordinary appeal procedures.



AP PHOTO

Deportation proceedings for INS detainees are presumptively open to the public. Shown here are Chinese refugees from the "Golden Venture" shipwreck who were being smuggled into New York in 1993.

Am I entitled to attend an INS proceeding?

INS proceedings are handled by INS administrative courts rather than regular federal district courts. The administrative regulations provide that the proceedings "shall" be open to the public, but allow for closure if necessary for national security or privacy reasons. See 8 CFR 240.10(b). Also, the administrative judge may limit attendance due to space constraints, but preference is given to the press. 8 CFR 3.27.

Although the regulations provide for openness, journalists should expect many September 11th-related proceedings to be closed. On Sept. 21, 2001, Michael Creppy, the Chief Immigration Judge, issued a memorandum to "All Immigration Judges and Court Administrators," explaining that "the Attorney General has implemented additional security procedures for certain cases in the Immigration Court." Among other procedures, judges

are supposed to "close the hearing to the public" and avoid "disclosing any information about the case to anyone outside the Immigration Court." The rule also restricts immigration court officials from confirming or denying whether any particular case exists on the docket.

In theory, court closures should be determined on a case-by-case basis. Although court closure may be permitted when necessary for security reasons, each case should be evaluated on its own merit to determine whether closure is necessary. The across-the-board closure policy stated in the Sept. 21 memorandum violated this principle.

On Nov. 1, 2001, the Associated Press reported that INS courts were beginning to open some of the immigration proceedings. The AP report said that INS spokespersons denied that there had been a blanket closure of INS proceedings and stated that court closures were determined on a case-by-case basis. Nevertheless, some immigration proceedings remain closed.

What is the Alien Terrorist Removal Court?

The Alien Terrorist Removal Court was established in 1996, but the INS has not yet used it. The ATRC provides procedures to remove non-citizens who the government believes are terrorists, even if they have a green card and are not in violation of any immigration laws.

If a suspected terrorist has a green card, he is given court-appointed defense counsel. If the suspected terrorist does not have a green card, he is not entitled to court-appointed counsel.

The government may use classified (i.e. secret) evidence against the suspected terrorist to argue that he should be removed. The defense attorney is permitted to learn about the classified evidence, but the attorney is *not* permitted to reveal that evidence to the client or to discuss the evidence with the client. The alien is permitted to see an unclassified summary, if one is available.

Otherwise, these cases would proceed like INS civil cases.

When may secret evidence be used in INS cases?

Secret evidence — classified government documents used as evidence — may be used in all kinds of INS cases, but in limited circumstances.

As noted above, secret evidence may be used in ATRC proceedings. In such cases, the government may use classified (i.e. secret) evidence against a suspected terrorist to argue that he should be removed from the U.S. The alien is permitted to see an unclassified summary, if one is available. If the suspected terrorist has an attorney, the attorney may see the evidence, but may not discuss it with or reveal it to his client.

Secret evidence can be used in some ordinary INS removal proceedings. There are two kinds of removal proceedings: (1) "inadmissibility" proceedings (when the alien comes to the U.S. without proper authorization and seeks to get into U.S. territory), and (2) deportation proceedings (when the alien legally entered the U.S., but has overstayed his visa or failed to comply with green card requirements).

Secret evidence may be used in inadmissibility proceedings to make an initial showing that the alien should not be admitted. Secret evidence may not be used in deportation proceedings to make the initial showing that the alien should be deported. If the government wishes to deport someone based on secret evidence, they must use the ATRC.

However, secret evidence may be used in any type of proceeding, including deportation proceedings, to rebut defenses (such as a request for political asylum) raised by the alien. This is the most common circumstance for the use of secret evidence.

Is there any right of access to "secret evidence"?

Probably not. There are no reported appellate cases ruling on whether a member of the press may obtain classified evidence, but presumably secret evidence would be treated like sealed court records to which the press has no right of access. However, the press should certainly argue that immigration courts should follow the same procedures required to seal records in court proceedings: evidence should not be deemed "classified" or "secret" until the judge has held a hearing to determine whether there is a compelling justification for secrecy and whether the order is narrowly tailored to meet the government's interest.

What is the Foreign Intelligence Surveillance Act Court?

The FISA court is not a court that holds trials. The only job of the FISA court is to review applications for search and surveillance warrants. It allows intelligence officials to request warrants without compromising the secret or security-oriented information that may be used to justify the warrant.

The FISA court — a group of seven judges from different federal circuits that meets twice a month in Washington, with two judges always available in Washington — is entirely confidential and there is no public or press access to its proceedings or records. It is required to release only the number of applications for warrants and the number of warrants approved each year. The only way the public learns about any particular FISA court warrant is if criminal charges are eventually filed against the suspect.

With regard to the "War on Terrorism," the FISA court is not involved in the detainment or trial processes, but may be used by the Justice Department to obtain surveillance warrants to spy on those who have been released or others suspected of any potential terrorist involvement.

The Material Witness Statute

What is detainment under the material witness statute?

The material witness statute permits the detainment of any person who may have information pertaining to a criminal investigation for the purpose of testifying before a grand jury or during a criminal proceeding.

In order to detain a material witness, the government must first obtain a warrant. To obtain a warrant, a prosecutor must apply to a federal district judge and provide evidence demonstrating that the alleged witness has information crucial to the proceeding and would be otherwise unavailable. Normally, the evidence is presented in the form of an affidavit from an FBI agent, outlining his knowledge of the alleged witness' role in the investigation.

Any person who is detained as a material witness has a right to demand a hearing before a federal judge and the right to counsel, appointed at government expense, if necessary. A federal judge must determine whether the person is, in fact, a material witness and whether he may be detained. Detainment is supposed to be required only if there is a risk of flight or danger.

If the judge affirms the detainment, the person may be held for any length of time his testimony is needed for the criminal case. Thus, if his testimony is needed only for the grand jury proceeding, he may be held until he testifies for the grand jury, and then he would be released. If his testimony is deemed necessary for trial, the person could be held until the trial is completed, which could be years.

As a practical matter, persons held as material witnesses are rarely released unless the government is ready to release them. If the detainee challenges their detention, the government has other options, such as filing criminal charges against the detainee. This strategy was used against Terry Nichols. Nichols was originally detained as a material witness in connection with the bombing of the Murrah Federal Building in Oklahoma City. Nichols objected to his detention, arguing that there was no evidence that he would flee or otherwise be unavailable. The government then filed criminal charges against Nichols, making it irrelevant whether he would flee as a material witness, and kept him in jail as a criminal suspect.

Detainees who are genuine witnesses are expected to testify at grand jury proceedings or trials. If the detainee refuses to testify, then the person can be held in jail for contempt, unless they have a valid Fifth Amendment claim.

What happens if the witness invokes the Fifth Amendment?

The Fifth Amendment provides witnesses with a right to remain silent if their testimony

would incriminate them in any way.

If a witness invokes the Fifth Amendment, a judge must determine whether there is a valid Fifth Amendment claim.

If the judge determines that the claim is invalid, then the person must testify or he may be jailed for contempt. If the claim is valid, then the government must either release the witness or offer him immunity for his testimony. If immunity is granted and the witness still refuses to testify, then he may be jailed for contempt.

Are material witness proceedings open to the public?

Grand jury proceedings are normally closed to the public, so witnesses' testimony to the grand jury would be closed. However, the other court proceedings, such as the hearing to determine whether the witness should be detained or whether the witness has a valid Fifth Amendment privilege, are ordinary court proceedings. Therefore, those proceedings should be presumed open to the public. But, as in any case, the judge may close the proceeding or seal records in some circumstances.

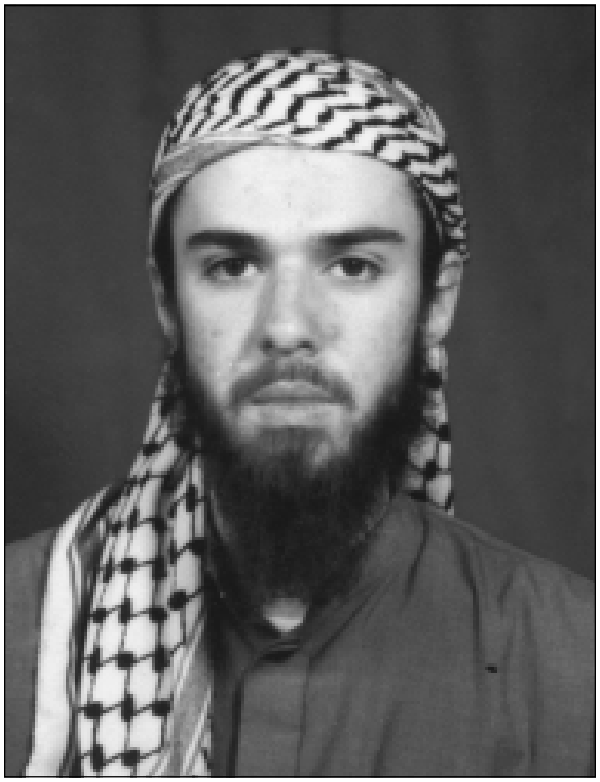
The Reporters Committee contends that federal judges should not close material witness proceedings without first evaluating the First Amendment issues involved. The procedures a judge should follow before closing a courtroom are described fully in the section below regarding criminal proceedings.

May I obtain the material witness warrant or affidavit?

In theory, the warrant and affidavit would be part of the court's records. However, it is likely that courts will seal these records.

A court record should be presumptively available to the public. However, records may be sealed if the court makes specific, on-the-record findings demonstrating that closure is necessary to preserve higher values, and if the order is narrowly tailored to serve that interest. Journalists should expect judges to use this test to seal warrants from the September 11th investigation.

However, even if a material witness warrant is sealed, the existence of the warrant should be noted on the court's docket. In one case, a criminal defense attorney objected to the fact that the government prosecutors secretly obtained material witness warrants to detain witnesses and failed to tell defense counsel about the warrants. The warrants were not listed on the court docket, and the judge had sealed the records. The appellate court found that it may have been an error to keep secret the existence of the warrants and remanded the case to the trial court for further findings. (*United States v. LaFuente*)



AP PHOTO

John Walker Lindh, captured during a battle with Taliban forces, will be tried in a U.S. court.

In the post-Sept. 11 detentions, material witness warrants were most likely issued from the federal trial courts in the Southern District of New York in Manhattan and the Eastern District of Virginia in Alexandria.

How have material witness proceedings been used in the War on Terrorism?

The Department of Justice has not released an exact tally of persons detained as material witnesses, but it appears that the bulk of detainees who were first detained were brought in as material witnesses. As the investigation continued, many of the "material witnesses" were released or charged with crimes. For example, Osama Awadallah, a student from San Diego, had originally been detained as a material witness after investigators found his name and phone number on a piece of paper in the glove compartment of a hijacker's car. Awadallah told the grand jury that he did not know any of the hijackers, but changed his testimony once he was confronted with evidence that he did know a few of them. Awadallah was charged with perjury and is now being held as a criminal detainee rather than as a material witness. At the time of this report, it appears that only a small portion of the remaining detainees are being held as material witnesses.

Civil rights groups and foreign nations have protested the expansive use of material witness warrants, claiming that they were used as an excuse to round up Arab and Muslim men, without adequate evidence demonstrating that they had anything to do with the attacks or the hijackers. For example, in October 2001, *The Wall Street Journal* reported that Saudi Arabia, once notified of the detainment of its citizens, arranged for the release of nine out of the ten Saudis that had been held as material witnesses. Two of the men were telecommunications company executives who had been in Chicago for a conference. Other detained Saudis included a tourist, a pilot for Saudi Arabian Airlines and a radiologist living in Texas. The detainees alleged that there was no evidence tying them to the attacks or the hijackers. They claimed they had been detained solely because of their ethnicity.

Criminal Proceedings

Many of the detainees have been charged with criminal violations. According to a report issued by the Justice Department in November, at least 93 people have been charged with assorted federal crimes and will be tried in federal district court. Their cases are not sealed.

Since then, criminal terrorism charges have been brought against Zacarias Moussaoui and John Walker Lindh. They will be tried in federal court in Alexandria, Va.

In the past, accused terrorists have been tried in federal court, and there was some press access to the proceedings. Although the trials could not be televised, the press was permitted to attend the trial of Timothy McVeigh and the trials of the 1993 World Trade Center bombing conspirators.

Federal judges should not close any of the criminal proceedings without first evaluating the First Amendment issues involved.

The Supreme Court has established procedural requirements that must be carried out before closing a courtroom in a criminal case. In *Globe Newspaper*, the Court stated that "representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" For the "opportunity to be heard" to be meaningful, some notice must be provided before the trial court closes a courtroom. *(Globe Newspaper Co. v. Superior Court; United States v. Cojab)*

If a trial court wants to close its courtroom following the hearing, it must issue specific findings of fact that "closure is essential to preserve higher values [than the constitutional right of access] and is narrowly tailored to serve that interest." One reason that this procedural component is so important is so "that a reviewing court can determine whether the closure order was properly entered." *(Press-Enterprise Co. v. Superior Court (Press-Enterprise I); Press-Enterprise Co. v. Superior Court (Press Enterprise II))*

Any judge who wishes to close a proceeding should make the necessary determinations with written findings on the record before excluding the press.

Military Tribunals

President Bush signed a Military Order on Nov. 13, 2001, stating that suspected terrorists could be tried in military tribunals rather than regular courts. The order has raised concerns for a variety of reasons.

By the end of January 2002, the government had not yet issued specific regulations for the proposed military tribunals. It is therefore difficult to evaluate how a tribunal might work. However, there are a few examples that might provide guidance for determining whether there should be press access to a military tribunal.

AP PHOTO

Interviewing detainees like this man arriving at Camp X-Ray in Guantanamo Bay, Cuba, is more difficult when they are held on military bases.

How have tribunals been used in the past?

The first Supreme Court case to consider the use of a military tribunal was *Ex Parte Vallandigham*, decided in 1863. Clement Vallandigham was a U.S. citizen living in Ohio during the Civil War. Major-General Burnside, commander of the Ohio military, had declared that any person who expressed "sympathies for the enemy" would be tried for treason. Vallandigham was arrested for saying that the war was "wicked, cruel and unnecessary," and that it would "crush liberty" and establish "despotism." He was tried by military tribunal, convicted and imprisoned.

Vallandigham appealed to the U.S. Supreme Court. He argued that the military tribunal had no jurisdiction to try him. The Supreme Court denied certiorari, finding that it did not have the authority to hear the case for procedural reasons, even if it thought that the military had acted improperly.

A different result was achieved a few years later in *Ex Parte Milligan*. Milligan was a U.S. citizen living in Indiana. A general ordered that Milligan be arrest and tried for his membership in an organization known as the Sons of Liberty. The general believed that this group, including Milligan, conspired to overthrow the U.S. government and that Milligan gave aid to insurgents. Milligan was convicted and sentenced to be hanged. He then sought a writ of habeas corpus and argued that the military had no jurisdiction to try him.

The Supreme Court began by noting that emotions had run high during the war and that improvident decisions had been made. "During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question."

The Court stated that the Constitution governs "equally in war and in peace." It found that the use of a military tribunal was improper.

The Court noted that, during the War of 1812, American "officers made arbitrary arrests and, by military tribunals, tried citizens who were not in the military service. These arrests and trials, when brought to the notice of the courts, were uniformly condemned as illegal."

A few years later, however, at the end of the Civil War, a group of insurgents conspired to assassinate President Lincoln and other government officials. The accused conspirators were tried by military tribunal, despite the ruling in *Milligan*.

As a practical matter, it seems that military tribunals were used, despite the questions as to their constitutionality. Their use was again questioned before the Supreme Court during World War II in the case of *Ex Parte Quirin*.

In *Quirin*, a group of Nazi saboteurs attempted to sneak into the United States for the purpose of destroying U.S. infrastructure. They were captured almost immediately and tried by military tribunal. Defense lawyers argued that the accused spies were entitled to a speedy and public trial by an impartial jury, as well as the other constitutional protections contained in the Bill of Rights. The attorney for the spies, relying on *Milligan*, argued that the Constitution applied even during war.

By the time the case was appealed to the Supreme Court, there was a great deal of political pressure to uphold the convictions. The *Quirin* decision upheld the use of a military tribunal as used under the specific circumstances of that case, because the accused spies were "unlawful belligerents." Nevertheless, many experts argue that it does not provide blanket authorization for the use of military tribunals. Scholar Michael Belknap wrote that Justice Stone thought it was a "dubious decision." Justice Douglas also regretted the ruling. "It is extremely undesirable to announce a decision on the merits without an opinion accompanying it," he said, referring to the fact that the Court entered a brief order upholding the tribunals shortly after the arguments, but did not issue a full opinion until many months later. Justice Stone, in writing the opinion, admitted that "a majority of the full Court are not agreed on the appropriate grounds for the decision." The Court also recognized that some offenses cannot be tried by a military tribunal because they are not recognized by our courts as violations of the law of war or because they are in the class of offenses constitutionally triable only by a jury.

Although the *Quirin* decision appears to authorize military tribunals for "unlawful belligerents," the court failed to articulate specific criteria that must be present in order for a military tribunal to be valid. The Court stated, "[w]e have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here . . . were plainly within those boundaries . . . ." The Court narrowed its decision to avoid any sweeping statement regarding military jurisdiction and provided little guidance for application to future cases.

In 1946, a few years after the *Quirin* decision, the Court ruled in *Application of Yamashita* that military commissions may be used during war to try enemies captured overseas for violations of war laws. The Court therefore upheld the conviction by military tribunal of a Japanese military officer during World War II.

Justice Murphy, however, wrote a dissenting opinion, in which he expressed concern that military tribunals were improper because they failed to provide an accused with the procedural protections required of American courts. He stated, "[a]t a time like this when emotions are understandably high it is difficult to adopt a dispassionate attitude toward a case of this nature. Yet now is precisely the time when that attitude is most essential. While people in other lands may not share our beliefs as to due process and the dignity of the individual, we are not free to give effect to our emotions in reckless disregard of the rights of others. We live under the Constitution, which is the embodiment of all the high hopes and aspirations of the new world. And it is applicable in both war and peace. We must act accordingly. Indeed, an uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of deal-

ing with a fallen enemy commander, can do more lasting harm than all of the atrocities giving rise to that spirit."

Later that year, in *Duncan v. Kahanamoku*, the Court ruled that military tribunals could not be used to try citizens, even when martial law had been declared in Hawaii after Pearl Harbor had been attacked. The Court found that the due process protections of American courts were still necessary.

In *Hirota v. MacArthur*, the Court considered habeas corpus petitions from Japanese citizens who were being held in custody pursuant to the judgments of a military tribunal in Japan after World War II. The tribunals had been set up by General Douglas MacArthur of the U.S. military, but his actions had been authorized by the Allied Powers and the tribunals were condoned by all of the Allied nations. Many of the judges, in fact, came from other Allied nations. The Court therefore ruled that it had no jurisdiction to hear the petitioners claims because the tribunal was "not a tribunal of the United States." It was an international tribunal in which the U.S. happened to play a lead role.

In 1950, the Court's decision in *Johnson v. Eisentrager* again confirmed the use of military tribunals. In *Johnson*, a group of Germans who had been captured in China during World War II challenged their trial and conviction by military tribunal. The Court held that nonresident aliens have no right of access to American courts during wartime, and therefore they may be tried by military tribunal.

A few years later, the Court upheld the conviction of an American citizen who was tried for murder by a military tribunal. In *Madsen v. Kinsella*, the Court ruled that the wife of an American soldier could be tried by military commission for murdering her husband while in U.S.-occupied Germany after World War II. However, in a 1957 case, *Reid v. Covert*, the Court ruled that the military could not try dependents of American soldiers in military courts, at least in capital cases. The *Reid* case also involved the trial of an American woman who was charged with killing her husband, a member of the U.S. military.

The late-1950's cases of *Reid* and *United States ex rel. Toth v. Quarles* expressed a certain distrust of the military and found it an unsuitable forum for fair trials. In *Toth*, the Court held that a person who was in the military but who has since been discharged may not be subject to trial by court-martial, even if the alleged crime occurred while the accused was in the military. The Court noted that Congress had constitutional authority to regulate the armed forces, and thus, those serving in the military could be disciplined in military courts as Congress directed. But the Constitution grants no authority that would permit Congress to apply military courts to civilians, even to those who were formerly in the military. Expanding the jurisdiction of military courts beyond the most limited definition would encroach on the jurisdiction of federal courts which had been established under Article III of the Constitution. The Court noted that the federal court system was constitutionally preferable to a military court and did not want to expand the jurisdiction of the less preferred system.

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George John Dasch, Ernest Peter Burger, Heinrich Harm Heinck and Richard Quirin and four other men were convicted by a military tribunal of being saboteurs for Nazi Germany in 1942. The U.S. Supreme Court upheld the validity of the tribunal in a controversial decision the same year.

Is the press entitled to access to military courts in general?

In general, military trials are open to the public. Rule for Courts-Martial 806(b) states that military courts are presumptively open to the public. However, they may be closed if classified evidence is used or if there are other security concerns.

Military courts have also acknowledged that there is a First Amendment right of access to military proceedings, but that right accrues to the "public," and there is no special right of access for the press. *(ABC, Inc. v. Powell)*

It is unclear whether the general military court rules would be applied to the proposed military tribunals.

Has there been press access to military tribunals in the past?

There may have been at least one instance of press access to a U.S. military tribunal.

Military tribunals were used to try the alleged conspirators who planned President Lincoln's assassination. A recent article in *The Washington Post* reported that the trials were originally closed, but reporters complained to General Ulysses S. Grant, who arranged for a meeting with President Andrew Johnson. The result was press access to the trials.

Also, in the past, the identities of the judges who have served on military tribunals have been available to the press. In the post-World War II Tokyo Tribunals, for example, the identity of the judges were known.

Although it is not clear whether the administration will try to bar press access to any potential military tribunals, there is some historical support for access.

Detainment Questions

Can I interview a detainee?

Detainees are being held either in jails, INS detention facilities, or military bases. Although the Supreme Court has held that there is a presumptive right of access to criminal proceedings, it has not extended that presumption to all law enforcement facilities.

If the detainee is in a federal prison, reporters must get permission from the Federal Bureau of Prisons to obtain access to the detainee. The BOP may deny access if they feel there is a safety or security concern. The decision to grant access is entirely within the BOP's discretion.

If the detainee is in an INS facility, then reporters must obtain permission from the INS. The INS issues manuals that explain its policies and procedures. One manual outlining its detention standards, including visitation, states:

"To better inform the public about INS detention operations, facilities shall permit representatives of the news media and non-governmental organizations to have access to non-classified and non-confidential information about their operation; given appropriate notice, to tour facilities; and, with permission from INS and the detainees, to interview individual detainees."

Thus, the INS would, in theory, permit interviews in its facilities. However, it may restrict the hours of visitation and place limits on what may be brought into the facility. Any journalist who seeks access to INS detainees should review the INS manual, which is available from the agency's website (www.ins.gov).

However, the INS has limited facilities, and it therefore contracts out to local jails to hold detainees. If an INS detainee is held in a local jail, then a reporter needs permission from the local jail. The INS manual quoted above states that its policies apply to Contract Detention Facilities, but local policies may nevertheless interfere with access. Some states have statutes that allow access to any inmate who asks to speak to the press. In such states,

a reporter has a better chance of obtaining access than in a state where decisions are left in the hands of local sheriffs.

Regardless of ordinary policies, it seems that the INS has limited access to detainees in some circumstances. The *Milwaukee Journal-Sentinel* reported that, for a while, the INS cut off all access to immigration detainees, even by lawyers or family members. After the September 11th attacks, the INS ordered local jails in Wisconsin, Illinois and Indiana holding INS detainees to cut off all access indefinitely. However, the order was lifted within a week.

One practical problem in obtaining access to INS detainees is that the press does not necessarily know who has been detained. Although the Attorney General has released the names of persons charged with federal crimes, he has not released the names of the 548 people held to date on immigration charges. They have been identified only by a number and country of origin. However, any alien who is arrested has the right to contact their consulate. It may be helpful to call consulates to see whether they have information about the identities of their citizens who have been detained.

If the detainee is being held on a military base, such as the detainees at the base in Guantanamo Bay, Cuba, reporters would need permission from the U.S. military.

What is being done to provide the public with more information?

The following is a chronological description of efforts made to obtain information and the information officially released.

In the two months following the attacks, the Justice Department refused to release specific information about detainees. Groups estimated that more than 1,000 people had been detained, but it was unclear who they were, why they had been detained, or whether any had been released.

On Oct. 12, Ashcroft issued a memorandum urging government agencies to deny Freedom of Information Act requests whenever there was any possible basis for denying the request.

On Oct.17, the American Civil Liberties Union sent a letter, pursuant to the Freedom of Information Act, to Ashcroft, asking for information about the detainees.

On Oct. 29, 2001, a coalition of civil rights groups filed a FOI Act request to obtain information about the detainees. The request asked for the names of the detainees, the charges against each of them, the dates of detainment, and the detainees' location. The groups involved in the request included the Center for National Security Studies, Amnesty International, the American Immigration Lawyers Association and various Arab and Muslim organizations.

Later that week, six members of Congress asked the Justice Department to release information about the detainees. In a letter to Ashcroft, Senators Russell Feingold (D-Wisc.), Patrick Leahy (D-Vt.), and Edward Kennedy (D-Mass.), joined by Reps. Jerrold Nadler (D- N.Y.), Sheila Jackson-Lee (D-Tex.), and Robert Scott(D-Va.), expressed concern about the secret nature of the detainments.

On Nov. 8, 2001, the Justice Department announced that it would no longer release a total tally of persons detained in the September 11th investigation. It stated that it would release the number of people charged with violating immigration laws and the number of people held in federal custody, but it would not try to track the number of people detained and later released.

On Nov. 26, Ashcroft said that he would not name all persons detained in the terrorism investigation for two reasons. First, he argued that releasing names would invade the privacy of the persons detained and possibly result in a "blacklist." Second, he said that he did not want to release the names because it would help Osama bin Laden determine whether his aides were in custody.

Shortly thereafter, the Justice Department released some information. On Nov. 28, the Department of Justice released the names of persons charged with federal crimes in connection with the September 11th investigation. The list also identified the charges against each person. With regard to INS detainees, the Justice Department revealed the nationality of each of the 548 detainees and the nature of their immigration violations, but they referred to each detainee by number, rather than by name. These two documents are not available on the Internet, but may be obtained by calling the Department of Justice's public affairs office.

In early December, a coalition of groups, including the Reporters Committee for Freedom of the Press, filed a lawsuit in Washington, D.C., against the Department of Justice, alleging that the agency violated the FOI Act by refusing to respond to the requests for records that had been filed. The suit also claims that the Justice Department violated the First Amendment and common law right of access to court records by refusing to release court records pertaining to cases arising from the September 11th investigation. This suit is still pending.

According to *The New York Times*, the ACLU in December sent a letter to the consulates of the ten nations with the most citizens detained. The letter offered the ACLU's services to help the consulates deal with the American legal system. It was designed to be part of a strategy to aggressively pursue information about the detainees. *The Times* reported that the ACLU had previously met with FBI head Robert Mueller, but Mueller had refused to provide any information about the detainees.

In mid-January, in response to the lawsuit, Ashcroft said that many of the INS detainees had either been deported or released. He estimated that there were only about 450 INS detainees still being held. However, the *New Jersey Law Journal* reported that attorneys representing the detainees estimate that there are about 600 INS detainees in New Jersey, and many of them are still being held in secret. The Department of Justice has said that it had charged 117 immigrants with crimes unrelated to the September 11th attacks, and it is unclear whether those charged are the same detainees being held in New Jersey. The Department of Justice has been unwilling to clarify who is being held, where they are, and on what charges.

On Jan. 22, the ACLU's New Jersey Chapter filed a lawsuit in New Jersey, seeking the names of INS detainees held in county jails. The lawsuit, filed in Hudson County Superior Court, relies on New Jersey law, which requires the names of persons in jail and the dates of their confinement to be open to public inspection.

On Jan. 28, *The Detroit Free Press* and the *Ann Arbor News* filed a lawsuit in federal court in Michigan challenging the closure of immigration proceedings. The next day, the ACLU filed another lawsuit in Michigan to challenge the closure of immigration proceedings. The ACLU's lawsuit was filed on behalf of two newspapers, the *Detroit News* and the *Metro Times*, and Rep. John Conyers (D-Mich.). Conyers and the two papers complained because they had been excluded from the deportation hearing of Rabih Haddad, a Muslim community leader suspected of raising money for terrorist activities.

Both lawsuits, each filed in the federal District Court in Detroit, allege that the immigration proceedings relating to Rabih Haddad should be open to the public. The *Free Press*' suit asks for access to all future proceedings and for copies of transcripts of all past proceedings. The ACLU's suit focuses on Judge Creppy's order to close all immigration proceedings, claiming the order is unconstitutional. The ACLU has argued that there is a presumptive right of access to such proceedings, and the policy stated in Creppy's order is unconstitutional. Elizabeth Hacker, the immigration judge in the Haddad case, allegedly relied upon Creppy's order to close the Haddad proceeding. The defendants in both lawsuits are Ashcroft, Creppy and Hacker.

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